63 FLRA No. 182

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
COUNCIL 236
(Union)

and

GENERAL SERVICES ADMINISTRATION
NEW ENGLAND REGION BOSTON, MASSACHUSETTS
(Agency)

0-AR-4214

DECISION

August 14, 2009

Before the Authority: Carol Waller Pope, Chairman and Thomas M. Beck, Member

I. Statement of the Case

This matter is before the Authority on an exception to an award of Arbitrator Sean J. Rogers filed by the Union under § 7122(a) of the Federal Service Labor-Management Relations Statute (Statute) and part 2425 of the Authority's Regulations. The Agency filed an opposition to the Union's exception.

The Arbitrator found that the Agency's interview of employees in preparation for an upcoming arbitration violated the parties' collective bargaining agreement and §§ 7102, 7114(a), and 7116(a)(1) of the Statute. For the reasons that follow, we deny the Union's exception.

II. Background and Arbitrator's Award

The Union filed an institutional grievance over alternative work schedules. When the parties were unable to resolve the grievance, the Union invoked arbitration, and a hearing was scheduled. Award at 6. The Agency's counsel for the arbitration notified two bargaining unit employees that she wanted to interview them in preparation for the arbitration. Over the objections of the Union, she separately interviewed the employees, and no union representative attended the interviews. She began the interviews by providing each employee with a statement regarding the interview for the employee's signature. One employee refused to sign the statement and refused to be interviewed. The other employee signed the statement and participated in the interview. *Id.* at 9-10. Subsequently, the parties settled the grievance over alternative work schedules, and the arbitration hearing was cancelled. *Id.* at 10.

The Union filed the grievance in this case that was submitted to arbitration on the issue of whether the interviews of the two employees violated the parties' collective bargaining agreement or the Statute. *Id.* at 3. The Arbitrator concluded that the Agency counsel's statement to the employees was "confusing and clouded the employees' right to voluntarily participate in the interviews to the point of violating the requirements of the *Brookhaven*[*] [1] decision." *Id.* at 15 (footnote added). The Arbitrator also concluded that the employees could not be interviewed without the Union's permission because they were grievants and not witnesses. *Id.* at 13. Accordingly, the Arbitrator found that the interviews violated the agreement and §§ 7102 and 7114(a) of the Statute and constituted an unfair labor practice under § 7116(a)(1). *Id.* at 17.

In regard to remedy, the Arbitrator noted that, because the grievance over alternative work schedules had been settled, the remedy was limited. *Id.* at 18. As a remedy, the Arbitrator ordered that the Agency "may not interview grievants within the ambit of an institutional grievance without the Union's permission." *Id.* The Arbitrator also ordered that, when the Agency "exercises its right to interview bargaining unit employee-witnesses for a third-party adjudication, [the Agency] must give scheduling notices and *Brookhaven* advice narrowly drafted to achieve the purposes" of the Authority's decision in *Brookhaven*. *Id.* In addition, the Arbitrator noted that the Union had requested as a remedy that he "impose discipline on [the Agency's counsel] and . . . threaten discipline for future similar violations[.]" *Id.* The Arbitrator denied the request explaining that he had "no power to impose such relief." *Id.*

III. Positions of the Parties

A. Union's Exception

The Union contends that the Arbitrator's conclusion "that he could not provide a remedy concerning such future conduct of Agency Representatives against

1. * The Arbitrator's reference is to the decision of the Authority in *Internal Revenue Serv.*, 9 FLRA 930 (1982) (*Brookhaven*). In *Brookhaven*, the Authority established safeguards to protect employee rights under § 7102 of the Statute when management interviews bargaining unit employees "to ascertain necessary facts" in preparation for third-party proceedings. 9 FLRA at 933.

unit employees" is deficient. Exception at 2. The Union asserts, as follows:

> If an arbitrator finds a violation of an unfair labor practice under the Statute, he must provide a remedy similar to what the FLRA would have provided if the matter had been filed as an unfair labor practice charge.

Id.

B. Agency's Opposition

The Agency contends that the Union fails to establish that the Arbitrator's conclusion that he was not empowered to order the requested relief is deficient. The Agency asserts that, although the Authority has a broad range of remedial powers, the Union fails to show that its requested relief is a remedy "that the Authority has power to impose[.]" Opposition at 5.

IV. Analysis and Conclusions

When an exception to an arbitration award challenges an award's consistency with law, we review the question of law raised by the exception and the award *de novo*. *E.g., NTEU Chapter 24*, 50 FLRA 330, 332 (1995). In applying a standard of *de novo* review, we assess whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *E.g., NFFE Local 1437*, 53 FLRA 1703, 1710 (1998). In a grievance proceeding that alleges an unfair labor practice (ULP) under § 7116 of the Statute, an arbitrator functions as a substitute for an Authority administrative law judge (ALJ). *NTEU*, 61 FLRA 729, 732 (2006). Consequently, in resolving the grievance, the arbitrator must apply the same statutory standards that are applied by ALJs under § 7118 of the Statute. *Id.* In addition, when the arbitrator finds that a ULP was committed, the Authority defers to the judgment and discretion of the arbitrator in the determination of the remedy. *NTEU*, 48 FLRA 566, 571 (1993). Unless the party excepting to the arbitrator's determination of remedy establishes that a particular remedy is compelled by the Statute, we review the remedy determinations of arbitrators in ULP grievance cases just as the Authority's remedies in ULP cases are reviewed by the federal courts of appeals. *Id.* at 571-72. More specifically, we uphold the arbitrator's remedy determination unless the determination is "a *patent attempt* to achieve ends other than those which can fairly be said to effectuate the policies of the [Statute]." *Id.* at 572 (quoting *NTEU v. FLRA*, 910 F.2d 964, 968 (D.C. Cir. 1990) (*en banc*) (emphasis original)). We have emphasized that this "is a heavy burden indeed." *Id.* (quoting *NTEU v. FLRA*, 910 F.2d at 968).

The Union fails to meet this heavy burden here. The Union fails to demonstrate that its requested remedy was compelled by the Statute. In this regard, the Union cites no cases in which the Authority ordered such relief to remedy an unfair labor practice. In addition, the Union fails to establish that the Arbitrator's rejection of its requested remedy was a patent attempt to achieve ends other than those to effectuate the policies of the Statute.

Accordingly, we deny the Union's exception.

V. Decision

The Union's exception is denied.